

IDAHO PERSONNEL
COMMISSION

OCT 16 2008

FILED

IDAHO PERSONNEL COMMISSION
P. O. Box 83720
Boise, Idaho 83720-0066
Phone: (208) 334-2263

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

RENEE L. IVERSON,

Petitioner/Appellant,

vs.

IDAHO DEPARTMENT OF
PARKS AND RECREATION,

Respondent.

IPC NO. 07-010

**DECISION AND ORDER ON
PETITION FOR REVIEW**

This matter came for hearing on petition for review on September 16, 2008. The Appellant, Renee L. Iverson (hereinafter "Appellant" or "Iverson") was represented by Ronaldo (Ron) Coulter and Respondent Idaho Department of Parks and Recreation (hereinafter "IDPR") was represented by Brian B. Benjamin.

The petition for review concerns appeal of the preliminary decision of Hearing Officer David E. Wynkoop (hereinafter "Hearing Officer") holding that the IDPR's selection process and hiring decision for the Grants/Contract Management Supervisor position did not deprive Appellant of a right and/or benefit to which she was entitled by law.

I.

BACKGROUND AND PRIOR PROCEEDINGS

A. Factual Background

In March 2007, IDPR announced a vacant position titled Grants/Contract Management Supervisor ("GCMS position") through the Division of Human Resources ("DHR") as an "open competitive" position entitling any applicant either currently employed by an Idaho state department or from the private sector to apply. David Claycomb, ("Claycomb") had been employed for several years by IDPR as a Program Manager at the time of the GCMS position announcement. Iverson, also employed at IDPR as a Financial Specialist at the time, and Claycomb, among many others, applied for the vacant position.

All candidates filled out a written test as part of the application process, and the tests were graded and scored by staff at DHR. Iverson and Claycomb, among many others, met the minimum qualifications for the position. Iverson scored a 93 out of a possible 100 points on the minimum qualifications examination she took for the position and Claycomb scored 73 on the minimum qualifications examination. Their names were ranked in descending order according to the applicant's scores on a register of eligible candidates; however, the hiring register/list does not list the applicant's raw test scores.

Thereafter, at IDPR's request, DHR provided IDPR with Hiring List # 19565 ("open competitive register" or "open competitive list"). Exhibit E. This open competitive register contained the names of seventeen candidates who met the minimum qualifications for the position. All candidates on the open competitive list

scored 70 or higher in order to meet the minimum qualifications to be considered for the position. Only the top ten candidates from any DHR hiring register/list may be hired to fill a vacant classified position. Iverson ranked ninth on the open competitive list; Claycomb ranked fifteenth on the open competitive list. Four IDPR employees, including Iverson and Claycomb, were on the open competitive list; one former IDPR employee was also on the open competitive list.

David Ricks ("Ricks"), IDPR Administrator of Management Services, was the hiring manager responsible for making the hiring decision and, in fact, made the final hiring decision for the GCMS position. *Findings of Fact, Conclusions and Preliminary Order ("Preliminary Order")*, p. 4, Finding of Fact 29. Upon reviewing the open competitive list, Ricks noticed several internal IDPR applicants interested in the position but not among the top ten on the list. He inquired of IDPR Personnel Technician, Joyce Clark, whether he could interview and consider all internal department candidates. Clark stated he could but wanted to verify her answer and contacted Heather Vasquez, Human Resource Recruiter from DHR, to confirm that all internal candidates were eligible for hire and could be interviewed. *Preliminary Order*, p. 7. Heather Vasquez is also the DHR employee that certified the hiring registers in this case. Exhibits E and F.

Ms. Vasquez advised that IDPR could interview and consider all internal agency employees who met the minimum qualifications for the position. She confirmed that all internal candidates on the open competitive register would be eligible for hire on a smaller promotional register should one be certified. *Preliminary Order*, pp. 7-8; Tr., p. 411, L. 15 – p. 414, L. 18; p. 389, L. 11 – p. 390, L. 5. Based upon this, eleven

candidates on the open competitive list were interviewed, including all five IDPR employees. A twelfth candidate was also interviewed as a lateral transfer.

The interview panel consisted of Ricks and Jane Wright, Fiscal Officer for IDPR, although the ultimate hiring decision was to be made by Ricks. Ricks selected Ms. Wright because she works with the accounting section and closely with the grants personnel regarding spending authority. Whoever was hired in this position would also be working closely with Ms. Wright. Tr., p. 180, Ls. 3-17. Ricks liked to receive input from others even though he made the final decision. Prior to her interview, Iverson requested that Ms. Wright be recused from participating in her interview because of an audit Iverson was conducting that she felt created or could be perceived as a conflict. This request was honored and Joyce Clark, with Ricks, interviewed Iverson.

On May 7, 2007, the first Monday after the interviews, Ricks, Wright, and Clark deliberated about the candidates starting at 8:30 a.m. and going for approximately 20 minutes. Tr., p. 393, L. 17 – p. 394, L. 16; Tr., p. 395, Ls. 12-13. Based on the interviews of the twelve candidates, Ricks' top three candidates were Claycomb, Iverson, and Jake Howard, in that order. Ms. Wright's top three candidates were Claycomb, Jeff Cook, and Shere Garey. Tr., p. 370, Ls. 9-13. Ms. Clark's input corroborated Ricks' impressions that Iverson "interviewed well." Tr., p. 395, Ls. 2-4. Ricks felt that Claycomb had the best interview and his qualifications best met the particular needs of the position. Tr., p. 191, Ls. 2-4; p. 193, L. 25 - p.194, Ls. 1-2.

Immediately following their meeting, Ricks informed IDPR Human Resources staff of his desire to offer the position to Claycomb. Because Claycomb was not ranked among the top ten candidates on the open competitive register, but would be eligible for

hire on either a statewide promotional register or departmental promotional register, Ms. Clark contacted DHR on May 7, 2007, to certify a departmental promotional register. Tr., p. 395, L. 14 – p. 396, L. 20. DHR actually provided IDPR with a statewide promotional register – Statewide Hiring List # 19795 was provided to IDPR on the morning of May 7, 2007 at approximately 8:58 a.m. Exhibit F. Iverson was fifth on this statewide promotional register and Claycomb was ranked seventh. That morning Ricks notified Claycomb that he was the successful applicant and offered him the position. Ricks testified he offered the position to Claycomb “close to 9:00 o’clock, 9:15” that morning. Tr., p. 199, Ls. 15-20. Later that morning, Ricks notified Iverson and the other internal candidates that he offered the position to Claycomb.

Upon learning this, Iverson filed a problem solving grievance on May 8, 2007. Iverson’s grievance alleged she and Jill Murphy, another internal female candidate that also applied, had more experience and scored higher on the application test than Claycomb. She also alleged IDPR Policy II-1 (Exhibit C) required the departmental promotional register and open competitive register to be merged making Claycomb ineligible to be hired. After several problem solving meetings and reviewing the hiring process and decision, IDPR Director Robert Meinen issued a memo, dated May 24, 2007, to Iverson in response to her grievance. Exhibit 4.

B. Procedural History.

Iverson timely appealed Director Meinen’s May 24, 2007 decision of the problem solving to the IPC asserting that the hiring decision to promote Claycomb to the GCMS position was discriminatory on the basis of age and gender. She cited no specific allegations in support of her claim that age and gender were motivating factors in the

hiring decision, other than the fact that the individual hired is a male and she contends that he is less qualified than she is for the position. Iverson also asserted that IDPR's selection process and hiring decision deprived her of a right or benefit to which she was entitled by law. See Idaho Code § 67-5316(1)(b).

After filing her appeal, Iverson requested IDPR to produce five years of hiring registers (2002 – 2007) used in hiring all “professionals” for the IDPR. The stated purpose in the memorandum in support of her discovery motion was to determine whether IDPR's hiring practices were having a “disparate impact” on females in general. *Decision Regarding Motions*, pp. 8-9. IDPR objected to producing that information and filed written objections. IDPR also filed a Motion to Dismiss, or in the Alternative, for Summary Judgment.

After reviewing the record, affidavits, and arguments of the parties the Hearing Officer issued his *Decision Regarding Motions* on August 23, 2007, wherein he ruled the IPC lacks subject matter jurisdiction regarding Iverson's claims of discrimination based on gender and age. Those non-disciplinary claims of discrimination must be brought and are more properly adjudicated before the Idaho Human Rights Commission (IHRC) and/or EEOC. He also held those claims do not fall under the limited jurisdiction of the IPC's jurisdictional statute, Idaho Code § 67-5316(1)(b), which states Iverson may only appeal “the failure of the appointing authority to provide a right and/or benefit to which she is entitled by law.”

Therefore, the Hearing Officer's ruling also denied Iverson's request for discovery, finding that discovery of statistical evidence of discrimination against employees other than Iverson (and by other hiring managers) is not relevant and not

likely to lead to admissible evidence. *Decision Regarding Motions*, p. 9. The Hearing Officer also noticed the potential harm, confidential intrusion, and burden associated with allowing the discovery was not justified by her generalized discrimination claims.

The Hearing Officer, however, denied IDPR's Motion for Summary Judgment and proceeded to hearing on the issue of "whether Iverson was denied a right or benefit to which she was entitled by law during the course of her application to be promoted to the position." *Decision Regarding Motions*, p. 10.

After a two-day hearing of the testimony and evidence, the Hearing Officer issued his *Preliminary Order* dated October 3, 2007. The Hearing Officer held IDPR's selection process and hiring decision did not deprive Iverson of a right or benefit. His analysis included, among other things, IDPR requesting and hiring Claycomb from the statewide promotional register, Ms. Wright's participation in the interview and selection process, and IDPR's legitimate reasons for the hiring decision. Iverson timely appealed to the IPC from the Hearing Officer's denial of her motion for discovery and his Preliminary Order finding there was no deprivation of any entitled right or benefit.

II.

ISSUES

1. Did the Hearing Officer properly deny Appellant's motion for discovery seeking production of hiring registers and promotion lists used by IDPR in hiring professionals from the years 2002-2007?
2. Was Appellant denied a right and/or benefit to which she is entitled by law by virtue of IDPR's selection process and hiring decision for the GCMS position?

III.

STANDARD OF REVIEW

When a matter is appealed to the Idaho Personnel Commission it is assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law.

On petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript, and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). The Commission exercises free review over issues of law. The Commission may affirm, reverse, or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

IV.

DISCUSSION

A. The Hearing Officer properly denied Appellant's motion for discovery seeking production of hiring registers and promotion lists used by IDPR in hiring professionals from the years 2002-2007.

1. The Issue of Discrimination Is Not Properly Before the IPC

The IPC is a tribunal of limited jurisdiction whose jurisdiction depends entirely upon the statutes which grant its powers. See *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979).

Idaho Code § 67-5316 of the Personnel System Act ("PSA") is the jurisdictional statute conferring limited jurisdiction to the IPC to hear appeals from state classified employees. Idaho Code § 67-5316(1) states in pertinent part:

- (1) Appeals **shall be limited** to the following:
 - (a) Any classified employee who has successfully completed the entrance probationary period may, after completing the departmental due process procedure, appeal a **disciplinary dismissal, demotion or suspension**.
 - (b) Any classified employee may, after completing the departmental problem-solving procedure, appeal the failure of an appointing authority to provide **a right and/or benefit to which the employee is entitled by law**. (Emphasis added).

This statute defines and strictly limits the IPC's jurisdiction. *Sheets v. Idaho Dept. of Health and Welfare*, 114 Idaho 111, 753 P.2d 1257 (1988); *Stroud v. Dept of Labor and Industrial Services*, 112 Idaho 891, 893, 736 P.2d 1345, 1347 (Ct. App. 1987). Iverson's appeal claims she didn't receive a promotion due to illegal age and /or gender discrimination. There has been no disciplinary action precedent to the alleged discrimination to trigger jurisdiction under Idaho Code §§ 67-5316(1)(a) or 67-5316(4). Therefore, the only subsection of Idaho Code § 67-5316(1) that can be asserted to give the IPC jurisdiction in this case is Idaho Code § 67-5316(1)(b) set forth above.

This is not the first occasion the IPC has dealt with its jurisdictional limits regarding claims of discrimination, harassment, or other employment theories outside of the PSA. See *King v. Department of Corrections*, IPC No. 98-22 (Decision and Order on Petition for Review, June 17, 1999); *Coler v. Idaho Department of Correction*, IPC No. 95-16 (April 18, 1997), 1997 IPC Reporter at 53. In *King* the IPC announced in unequivocal terms the limits of its jurisdiction. The appellant in *King* alleged that after months of being subjected to "continual pressure, harassment and unfair treatment" he

considered himself constructively discharged and he resigned. In affirming the Hearing Officer's order dismissing the appeal for lack of jurisdiction, the IPC reasoned as follows:

Idaho Code § 67-5316(1) does not vest this Commission with jurisdiction to hear appeals on every action taken by an agency against an employee, even when the agency may have acted wrongfully or illegally. The remedy for **non-disciplinary** claims of discrimination, retaliation by agencies against employees, or constructive discharge remains, as it always has, with the courts.

King, IPC No. 98-22 (June 17, 1999), 1999 IPC Reporter at p.67-68. (Emphasis added.)

Iverson's discrimination claims on the basis of her age and gender are theories for relief outside of the jurisdiction of the IPC and are derived from Title VII of the Federal Civil Rights Act of 1991 (42 U.S.C. § 2000e, *et seq.*) and/or the Idaho Human Rights Act at Idaho Code § 67-5901, *et seq.*, and/or the ADEA at 29 U.S.C. § 623, *et seq.* Jurisdiction of these claims and the remedies for them lie in those statutes and with the state and federal courts. The Idaho Human Rights Act requires that any person who believes he/she has been the subject of illegal discrimination (Idaho Code § 67-5907) must file a complaint with the IHRC as a condition precedent to litigation (Idaho Code § 67-5908(2)), where upon a complainant may file a civil action in district court.

Iverson's claims of discrimination are not being raised as a defense to any form of disciplinary action, but purely as a cause of action for which she believes she is aggrieved. The Hearing Officer was correct in deferring review of those claims to the IHRC and limiting his inquiry to whether Iverson had been denied a right or benefit in the hiring and selection process. The IPC has no subject matter jurisdiction over Iverson's non-disciplinary claims of gender and age discrimination.

2. Iverson was Properly Denied Discovery of Statistical Evidence

While Iverson agrees the Hearing Officer was correct in ruling the IPC has no jurisdiction to consider the ultimate issue of discrimination (see *Appellant's Brief on Petition for Review*, p. 10), she argues denying her discovery of statistical evidence denied her the opportunity to present her case in the proper context in violation of the standards announced in *Karr v. Division of Veterans Services*, IPC No. 01-19 (2003).

This argument is without merit. The Hearing Officer correctly distinguished *Karr* from his ruling in this matter. *Decision Regarding Motions*, p. 9. *Karr* involved the disciplinary termination of an employee where the Hearing Officer limited proof to a certain time period (just before her termination) and excluded evidence of alleged retaliation and other evidence in her personnel file that put the insubordination allegations into proper context for the purpose of determining credibility of witnesses. In this case, Iverson's discovery/use of statistical evidence of other employees and other hiring manager's decisions would not have the same import.

The Hearing Officer correctly noted that *Karr* sought to admit testimony and evidence of her own personnel file and past incidents involving her to obtain a complete context for the termination, whereas Iverson seeks records involving other employees (and other hiring managers' decisions) to support her claims. *Decisions Regarding Motions*, p. 9. The only relevant "context" is the applicants and hiring process utilized for the GCMS position at issue in this case, which has been fully disclosed in the record.

In his ruling, the Hearing Officer explained that Iverson articulated no evidence of discrimination specific to her, nor had she alleged any specific practice or IDPR policy she believes to be discriminatory. Even so, Iverson wanted to "search for evidence to

establish a pattern of discrimination by statistical analysis by examining IDPR's overall hiring and promotion practices." *Decision Regarding Motions*, p. 4. The Hearing Officer recognized that this was nothing more than a "fishing expedition" which would produce nothing related to the selection process at issue and, instead, would delve into subject matter outside the purview/jurisdiction of the IPC.

The Hearing Officer was correct in denying the discovery request. The IPC has no jurisdiction over Iverson's generalized discrimination claims when they are not raised as a defense to a disciplinary action, and the hiring and promotional registers sought were only relevant on those issues. Absent IPC subject matter jurisdiction on the issues to which the hiring and promotional registers are relevant, the Hearing Officer correctly found the hiring and promotional registers sought are "not relevant and not likely to lead to the discovery of admissible evidence in this proceeding." *Decision Regarding Motions*, p. 9.

B. The Hearing Officer Properly Found Iverson was not Denied a Right and/or Benefit to Which She is Entitled by Law

Iverson must demonstrate that IDPR denied her a right or benefit to which she is entitled by law as set forth in Idaho Code § 67-5316(1)(b). This specific provision of IPC jurisdiction has been reviewed by the Idaho Court of Appeals in *Stroud v. Department of Labor and Industrial Services*, 112 Idaho 891, 736 P. 2d 1345 (Ct. App. 1987) and by the Idaho Supreme Court in *Sheets v. Idaho Department of Health of Welfare*, 114 Idaho 111, 753 P.2d 1257 (1988). It is not without limits. Both *Sheets* and *Stroud* held that a right and/or benefit does not include contract, constitutional and/or tort law rights to be free from arbitrary, capricious and bad faith action by a department. *Sheets*, 114 Idaho at 113; *Stroud*, 112 Idaho at 893.

The state merit system is created under the PSA and governs the recruitment and hiring of public employees and the Administrator of DHR has been empowered by the legislature to adopt, amend or rescind such rules as may be necessary for proper administration of the PSA. Idaho Code § 67-5309. Creating, ranking, and certifying a hiring register is only the initial step in creating a list of eligible candidates who meet the minimum qualifications. It creates no substantive right to an interview, promotion, or employment offer. The Hearing Officer correctly noted at the outset and throughout his Preliminary Order the limits of his review of the hiring and selection process: "The state agency must determine from among the eligible applicants which applicant will best meet the needs of the agency. This proceeding is limited to consideration of whether the selection process was unlawful or not based upon merit – not to second guess Rick's final decision." *Preliminary Order*, p. 11.

1. Merit Selection Under the PSA and DHR Rules

Idaho Code §§ 67-5309(f) and (g) create a system of selecting candidates for classified service on a basis of open competitive merit, examinations or evaluations to determine eligibility, employment registers or hiring lists of eligible candidates and promotion in classified service. Specifically, Idaho Code § 67-5309 (f) states, in pertinent part:

A rule requiring fair and impartial selection of appointees to all positions other than those defined as nonclassified in this chapter, on the basis of open competitive merit examinations or evaluations Examinations may be assembled or unassembled and may include various examining techniques such as rating of training and experience, written tests, oral interviews, recognition of professional licensing, performance tests, investigations and any other measure of ability to perform the duties of the position. Examinations shall be scored objectively Employment registers shall be established in order of final score Certification of eligibility for appointment to vacancies shall be in accordance with a

formula which limits selection by the hiring department from among the ten (10) top ranking available eligibles plus the names of all individuals with scores identical to the tenth ranking eligible on the register. A register with at least five (5) eligibles shall be adequate

Idaho Code § 67-5309(g) states, in its entirety:

A rule that, whenever practicable, a vacancy in a classified position shall be filled by the promotion of a qualified employee of the agency in which the vacancy occurs. An interagency promotion shall be made through competitive examination and all qualified state employees shall have the opportunity to compete for such promotions. If an employee's name appears within certifiable range on a current register for a higher class of position, he shall be eligible for a transfer and promotion.

These statutes comprise a merit system for examining applicants and placing minimally-qualified applicants on a hiring list of eligible candidates. Eligibility simply means the candidate scored high enough on the examination to be deemed to have met the minimum qualifications. There is also clear legislative intent to allow for the promotion of qualified internal classified employees whenever practical. By its very nature, the merit system allows for different types of hiring registers or lists of eligible candidates. As long as a hiring register/list has at least five (5) eligible candidates, it is an adequate hiring register. DHR Rules 100 through 111 pertain to the eligibility (hiring) registers. DHR Rule 101 speaks of three types of eligibility (hiring) registers relevant to this matter:

- 1) **Departmental promotional registers** contain the names of classified employees in a particular department for a particular classification who successfully passed a departmental promotional examination for the class. (DHR Rule 101.02)

- 2) **Statewide promotional registers** contain the names of all classified employees in all state departments for a given classification who successfully passed a statewide promotional examination for the class. (DHR Rule 101.03)

3) **Open competitive registers** contain the names of all applicants for a given classification who successfully passed an open competitive examination for the classification. (DHR Rule 101.04)

Eligible candidates are placed on a register for a given classification rank in descending numerical order based on their final score on the minimum qualifications examination for the classification (DHR Rule 102.01). All hiring selections, except transfers and reinstatements, must be made from an eligibility register certified by DHR (DHR Rule 109). Neither the rule nor the statute distinguish which kind of eligibility register must be used. Further, neither the rule nor the statute requires that selection be made from a register initially generated for the position; a hiring agency may generate additional registers during the hiring process.

2. IDPR Followed the PSA and DHR Hiring Process

Beginning on page 6 of the *Preliminary Order*, the Hearing Officer analyzed Iverson's claims and found IDPR did not violate the statute or DHR rules by interviewing and selecting Claycomb from the statewide promotional register. We agree. Iverson argues that a hiring list from which a hire is made must physically exist prior to hiring someone for an open position and that, in this case, the hiring decision was made and communicated to Claycomb prior to physical existence of the relevant statewide promotional register. See Appellant's Brief on Petition for Review pp. 16-17.

In this case, IDPR was attempting to fill a single incumbency position. IDPR was unaware, and could not assume, that it would have a satisfactory pool of internal candidates who would apply for the job opening. For this reason, IDPR managers and human resource personnel sought to obtain the largest possible candidate pool by announcing and requesting an open competitive recruitment and register - one of the

eligibility registers created by DHR Rule 101. IDPR proceeded to interview the top ten ranked candidates, together with all of the other internal candidates not ranked within the top ten on the open competitive register, knowing that they would be eligible on a smaller department promotional or statewide promotional register.

IDPR would not have interviewed internal candidates outside of the top ten on the open competitive register had Ricks not first confirmed with Joyce Clark and DHR that all internal candidates were eligible to be hired. After the interviews, Ricks decided Claycomb was the best candidate. At that time, IDPR then requested DHR to certify the departmental promotional register for its selection purposes.¹ Nothing in the PSA or DHR rules require IDPR to have the promotional register “in hand” when Ricks decided who he wanted to hire or even when the offer was made to Claycomb, as argued by Iverson.

Further, contrary to Iverson’s assertion, after close review of the exhibits and transcript, it appears the relevant statewide promotional register did physically exist when Ricks communicated his decision to Claycomb and offered him the position. The decision was made to hire Claycomb during the morning meeting at 8:30 a.m. on May 7, 2007. That meeting lasted about 20 minutes. Tr., p. 393, L. 17 – p. 394, L. 16; Tr., p. 395, Ls. 12-13. The departmental promotional register was requested immediately thereafter and the statewide promotional register was certified and provided to IDPR by DHR at 8:58 a.m. that morning. Exhibit 9; Tr., p. 396, L. 8 – p. 397, L. 13. Ricks testified he offered the position to Claycomb “close to 9:00 o’clock, 9:15” that morning.

¹ A departmental promotion register was requested; however, a statewide promotional register was certified and provided by DHR. However, it didn’t matter since Claycomb was within the top ten and eligible to be hired on both registers.

Tr., p. 199, Ls. 15-20. It certainly appears that the statewide promotional register physically existed by the time Ricks offered the position to Claycornb.

Ultimately, while we question why IDPR didn't simply acquire a certified promotional register as soon as they realized the desire to interview candidates outside the top ten on the open competitive register, the actual process utilized by IDPR is not prohibited under the PSA or DHR rules, as long as there is an adequate number (minimum of five) of eligible candidates to certify a departmental or statewide promotional register at time of hire. This is also consistent with the intent of IDPR's recruitment guidelines and policy to recruit the best candidate and promote internal department employees. Testimony was produced at hearing to demonstrate this is an acceptable practice by IDPR as well as other state agencies and has been approved by DHR. Tr., p. 413, L. 7 – p. 414, L. 16; p. 309, Ls. 4-11. The only DHR rule that would have prevented IDPR from certifying a departmental or statewide promotional register in order to limit the eligible candidates to statewide or departmental internal eligible candidates was former IDAPA 15.04.01.112. Former DHR Rule 112 states, in pertinent part:

Use of Open Competitive Register. In instances where recruitment is undertaken to establish an open competitive register to fill a particular position or positions, any request for a register shall automatically be construed as a request for an open competitive register until at least one position is filled from such a register.

Former DHR Rule 112 was eliminated in 2001. Former DHR Administrator, Ann Heilman, testified at hearing that former DHR Rule 112 was stricken specifically to allow internal candidates to be eligible for promotion where they otherwise would be ineligible on an open competitive register to specifically to allow state agencies to do what IDPR

did in this case. Tr., p. 307, L. 12 – p. 309, L. 3. This is supported by the legislative intent of Idaho Code § 67-5309(g) to allow a vacancy to be filled by promotion of a qualified internal employee whenever practicable.

3. IDPR Did Not Violate Its Policy II-1

Iverson asserts that IDPR violated its own policy concerning its recruitment process and priority guidelines. IDPR Policy II-1 speaks to its recruitment process and sets forth recruitment priority guidelines to be followed whenever practical. The priority is set forth as follows:

- 1) Lay-off register;
- 2) Lateral transfer/voluntary demotion;
- 3) Department promotion; and
- 4) Open competitive register/probationary employees in the same classification.

With regard to department promotion, IDPR Policy II-1 provides the following:

Department employees with permanent status provided there are a minimum of five (5) qualified candidates. If there are less than five (5) qualified promotional candidates, the hiring manager will call for an open competitive register. The promotional candidates will be merged with this register and will be interviewed within the top ten (10) available candidates.

Exhibit C.

Iverson cites this provision for the proposition that IDPR, pursuant to its own policy, must merge the internal promotional candidates with the open competitive register. This interpretation is incorrect. The IDPR policy does not state anything that is not already set forth in the PSA and DHR rule regarding the adequacy of registers.

If there were less than five qualified promotional candidates on a statewide promotional register or departmental promotional register, this would be insufficient. See DHR Rule 111 and Idaho Code § 67-5309(f). In that case IDPR's policy, as well as

the merit system, would require those internal candidates to be merged with an open competitive register in order to make an adequate register of five to ten candidates. In this case, however, the statewide promotional register contained eight names in addition to Jeff Cook, who applied to the position as a lateral transfer. A merger of any internal candidates with those on the open competitive register was unnecessary. The statewide promotional register had enough eligible candidates on its own.

IDPR followed its recruitment policy. The policy explicitly states that its intent is to recruit the best candidates to fill vacancies; however, in order to do so, an adequate pool of qualified applicants needs to be established for an open position. Many times it is extremely difficult, if not impossible, to know how many internal candidates – either departmental or statewide in other agencies – will apply for a vacant position when the decision regarding what type of announcement to call for is being made by human resources staff and hiring managers. If an inadequate pool of candidates results by requesting a promotional announcement/register, it significantly extends the time and process in which a position will remain vacant because the agency would have to re-announce the position for a larger register. This concern is supported by the evidence in this case. Tr., p. 28, L. 20 – p. 29, L. 20; Tr., p. 41, L. 4 – p. 42, L. 11; Tr., p. 168, L. 12 – p. 170, L. 7.

Nothing in DHR rule, PSA, or IDPR policy limits or prevents DHR from certifying more than one type of register for a single announcement. As long as there are at least five eligible candidates for an adequate register, a selection from the top ten ranked eligibles from that register may be made. Here, there were enough eligible candidates

on the statewide promotional register that there was no need to merge them with the eligible candidates on an open competitive register as called for by IDPR's Policy II-1.

4. Jane Wright's Participation in the Interview and Selection Process Did Not Deny Iverson a Right or Benefit

Iverson asserts that she was denied a right and/or benefit to which she was entitled based on Jane Wright's participation in the interview and selection process. Ricks selected Ms. Wright to interview the candidates with him and provide her input for a number of legitimate reasons. There was going to be significant interaction between Ms. Wright, who was IDPR's fiscal officer, and the candidate chosen for the GCMS position. Ms. Wright also had considerable financial and accounting knowledge relative to the GCMS position, which at one time reported directly to the fiscal officer. After Iverson decided to apply for the position, she asked Betsy Johnson, IDPR Human Resource Officer, about recusing Ms. Wright for what Iverson believed to be an actual or apparent conflict. IDPR accommodated Iverson's request and recused Ms. Wright from her interview. Instead, Joyce Clark from IDPR interviewed Iverson with Ricks.

In her Petition for Review, Iverson asserts Ricks knew Wright and Iverson had a "strained relationship," but allowed her to remain on the panel for other candidates. Iverson claims this disadvantaged her because there was no opportunity for Clark, who participated in only Iverson's interview, to name her top three candidates and it was not possible for her to finish in both Ricks and Wright's top three.

As noted by the Hearing Officer, the uncontroverted testimony at the hearing demonstrated that Ricks was going to make, and did make, the hiring decision. *Preliminary Order*, p. 12. Ricks could have conducted the interviews on his own without input from anyone, but testified he liked small panels because a lot of factors go into a

hiring decision and he likes to receive input on those, even though he knows it is his decision. Tr., p. 179, L. 12 – p. 180, L. 9. In this case, Ricks was already Iverson's supervisor and was familiar with her work performance and strengths and weaknesses. The fact that Ms. Wright was recused from Iverson's interview allowed Iverson to be evaluated during the interview without any alleged conflict Ms. Wright could bring. By all accounts, Ricks and Iverson testified their working relationship was good. There is no PSA statute, DHR rule, or other authority that may have been violated by allowing Wright to remain involved in interviewing other candidates and participating in the selection process.

Most important, Iverson has not demonstrated how Wright's participation in other interviews and input in the selection process prejudiced her. Iverson was Ricks' second choice. Iverson cannot demonstrate how Ricks' hiring decision would have been any different had Ms. Wright or Clark also selected her in their top three. There is nothing to suggest Ricks would not have made the same hiring decision.

5. IDPR's Hiring Process and Decision was Consistent with Idaho's Merit-Based Personnel System and Based on Merit

Finally, Iverson argues that the IDPR selection process was not consistent with the federal Uniform Guidelines on Employee Selection Procedures and that it was incompatible with a merit based personnel system. These cited guidelines are not applicable and are irrelevant. This argument simply rehashes Iverson's claims that the hiring decision was discriminatory on the basis of age and/or gender and, as discussed above, the IPC has no subject matter jurisdiction over those claims. The Idaho Legislature creates and defines our merit system for state employees together with administrative rule making from DHR and the IPC. The system encourages promotion

of internal department and statewide employees. Idaho Code § 67-5309(g). This public policy is the main factor that allowed all internal candidates on the initial open competitive register to be eligible for the position despite not being in the top ten on that list. As mentioned above, IDPR had confirmed with DHR that all internal candidates on that initial register were eligible for hire on a promotional register before they started the interview process.

IDPR's hiring process was based on merit. Ann Heilman's testimony is significant. She testified that a hiring process is based on merit if all candidates are first screened and determined by DHR to meet the minimum qualifications for the job (i.e. rank in top 10 on any DHR hiring register). Tr., p. 335, L. 20 – p. 336, L. 7. This is all-important and this occurred in the hiring process for the GCMS position. If DHR rankings on the hiring registers were determinative, there would be no need for interviews or background checks and no opportunity for agencies to choose the person who is the best fit for the position. *Preliminary Order*, p. 11. This point is worth emphasizing. As long as the hiring process is based on merit and relevant PSA statutes and DHR rules were followed, no right and/or benefit was denied Iverson. Ricks' decision cannot be second-guessed.

V.

CONCLUSION

Having reviewed the record, including the *Decision Regarding Motions* issued by the Hearing Officer on August 23, 2007, the *Findings of Fact, Conclusions of Law and Preliminary Order* of the Hearing Officer dated October 3, 2007, and the briefs of the parties, this Commission finds no reason to overturn the Hearing Officer's decision. The

Hearing Officer was correct in his analysis and decision denying Iverson's motion for discovery of IDPR hiring registers and promotion lists. The issue of discrimination is not properly before the IPC; there is no jurisdiction. Therefore, as the Hearing Officer found, statistical evidence related to "generalized discrimination" against other employees (besides Iverson) was (and is) not relevant to the only remaining question – whether Iverson was denied a right and/or benefit to which she was entitled by law by virtue of IDPR's selection process and hiring decision for the GCMS position.

Further, this Commission upholds the decision of the Hearing Officer that IDPR did not violate any statute or rule in the selection process for the GCMS position. The selection process was based upon merit because IDPR only considered persons certified by DHR to have the minimum qualifications for the GCMS position. IDPR was entitled to request a promotional register and to hire any person ranked in the top ten of that list. IDPR's Policy II-1 did not preclude IDPR's consideration and selection of Claycomb for the GCMS position, nor was it a violation of law or rule to include Ms Wright in the interview process. Iverson was not denied a right and/or benefit to which she was entitled by law by virtue of IDPR's selection process or hiring decision for the GCMS position.

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and

remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

DATED THIS 16th day of October 2008.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION



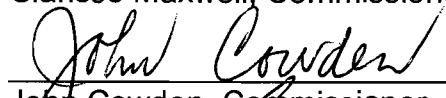
Mike Brassey, Commission Chairman




Pete Black, Commissioner



Clarisse Maxwell, Commissioner



John Cowden, Commissioner



Evan Frasure, Commissioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following parties by the method stated below on this 16th day of October 2008.

FIRST CLASS MAIL

Ronaldo A. Coulter
Idaho Employment Law Solutions
The Law Firm of Ronaldo A. Coulter, PLLC
776 E. Riverside Drive, Suite 200
Eagle, Idaho 83616

Brian Benjamin
Deputy Attorney General
Civil Litigation Division
954 W. Jefferson – 2nd Floor
Boise, ID 83720-0010


Secretary, Idaho Personnel Commission